INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	4
Specification of errors to be urged	6
Reasons for granting the writ	6
Conclusion	11
Appendix	12

CITATIONS

Cases:	
Florian v. *United States*, 114 F. (2d) 990	6
United States v. *Shepanek*, pending on petition for certiorari No. 1039	11
United States v. *Florian*, 312 U. S. 656	7
United States v. *Lawson*, 124 F. (2d) 1020	11
United States v. *McClure*, 305 U. S. 472	10
Statutes:	
Section 305, World War Veterans' Act, June 7, 1924, as amended (38 U. S. C., Sec. 516)	2
Miscellaneous:	
64 Cong. Rec., Pt. 5, p. 5195	9
34 Op. A. G. 369	9
Letter from Administrator of Veterans' Affairs to Solicitor General, dated February 16, 1942	12

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1038

THE UNITED STATES OF AMERICA, PETITIONER

v.

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, ADMINISTRATOR, ETC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in the above-entitled case on December 13, 1941.

OPINIONS BELOW

The District Court for the Northern District of Illinois rendered no opinion. The opinion of the Circuit Court of Appeals is reported in 124 F. (2d) 743.

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JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 13, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether compensation accruing to a World War veteran after he has become totally permanently disabled may be used under the provisions of Section 305 of the World War Veterans' Act to revive his lapsed war risk term insurance where such compensation was uncollected on the date of the death of the veteran.

An incidental question presented is—

Whether the fact that no issue was raised between the Government and an insured during his lifetime as to whether he was totally permanently disabled, precludes a defense to a claim for the revival of lapsed insurance under Section 305 that the insured became totally permanently disabled at a time when no compensation was due him.

STATUTES INVOLVED

Section 305 of the World War Veterans' Act of June 7, 1924, as amended, as contained in 38 U. S. C. 516, provides in part:

> Where any person has heretofore allowed his insurance to lapse, or has canceled or reduced all or any part of such insurance,

> while suffering from a compensable disability for which compensation was not collected and dies or has died, or becomes or has become permanently and totally disabled and at the time of such death or permanent total disability was or is entitled to compensation remaining uncollected, then and in that event so much of his insurance as said uncollected compensation, computed in all cases at the rate provided by section 302 of the War Risk Insurance Act, as amended by Act December 24, 1919, ch. 16, 41 Stat. 371 would purchase if applied as premiums when due, shall not be considered as lapsed, canceled, or reduced; and the Veterans' Administration is hereby authorized and directed to pay to said soldier, or his beneficiaries, as the case may be, the amount of said insurance less the unpaid premiums and interest thereon at 5 per centum per annum compounded annually in installments as provided by law. * * *

Other pertinent statutory provisions, together with a letter from the Administrator of Veterans' Affairs to the then Solicitor General, dated January 14, 1941, appear in the Appendix to the Government's petition for a writ of certiorari (pp. 18–25) in *United States* v. *Florian*, 312 U. S. 656.[1] Printed in the Appendix hereto (*infra*, pp.

[1] For the convenience of the Court, nine copies of the *Florian* petition have been filed with the Clerk. Copies are being furnished counsel.

12–14) is a letter from the Administrator to the present Solicitor General, dated February 16, 1942.

STATEMENT

This suit was originally brought March 7, 1932, in the District Court of the United States for the Northern District of Illinois to recover death benefits under a $10,000 contract of war risk term insurance issued to Robert Bruce Miller during the period of his military service, which ended in September 1919 (R. 2–5).

Miller died February 17, 1921 (R. 2, 24). The beneficiary named in his insurance contract died December 27, 1929 (R. 3, 24). In an additional count (R. 24–28), incorporated by amendment, the respondent, American National Bank and Trust Company of Chicago, as administrator *de bonis non* of the insured's estate and as administrator of the beneficiary's estate, sought recovery of the death benefits on the ground that the insurance, which lapsed in 1919, was revived and matured in favor of the beneficiary under Section 305, World War Veterans' Act, as amended, upon the death of the insured. The count alleged that the insured was suffering from a compensable disability at the time of his discharge from the service in 1919 for which compensation was not collected by him until some time thereafter, and that, at the time of his death on February 17, 1921, there was more than enough com-

pensation uncollected to purchase the full amount of the insurance granted him, if applied to the payment of premiums when due (R. 25).

The Government in its answer to this count (R. 29–30) alleged as an affirmative defense that the insured became totally permanently disabled on December 21, 1920, at a time when he was not entitled to any uncollected compensation (R. 30). Respondent moved to strike this affirmative allegation in the answer and also for summary judgment on the additional count (R. 31).

The District Court ordered the allegation stricken (R. 32) and entered judgment for respondent (R. 35–36), thus holding, in effect, that the insurance was revived and matured under Section 305 on the date of the insured's death, by compensation due and uncollected on that date, although none of such compensation accrued until after the insured became totally permanently disabled.[2]

A motion by the Government to set aside the judgment and to grant a new trial was denied (R. 36, 38) and the Government appealed (R. 39–40). The Circuit Court of Appeals for the Seventh Circuit affirmed.

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[2] Cf. the court's findings of fact and conclusions of law (R. 33–34). The same District Court had ruled in the Government's favor upon the identical question in the earlier *Florian* case but the Circuit Court of Appeals for the Seventh Circuit had reversed that ruling.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that compensation accruing to a World War veteran, after he has become totally permanently disabled, may be used under the provisions of Section 305 of the World War Veterans' Act to revive his lapsed war-risk term insurance.

2. In holding that a right to insurance benefits under Section 305 may arise upon the death of an insured who had previously become totally permanently disabled at a time when no disability compensation was due him.

3. In holding that the Government may be precluded from asserting that an insured became totally and permanently disabled at a time when no disability compensation was due him, if no issue as to his disability was raised by or with the Government until after his death.

4. In overturning a consistent and long-established administrative practice not clearly erroneous.

5. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. This case, as the court below stated, presents the precise question which that court decided against the Government in *Florian* v. *United States,* 114 F. (2d) 990. In that case this Court granted a petition for a writ of certiorari by the

Government, but found it unnecessary to decide the question because of the lack of a final appealable judgment by the District Court. *United States* v. *Florian*, 312 U. S. 656.[3]

2. In its petition in the *Florian* case (pp. 9, 15), the Government pointed out that the court's decision of the question is opposed to the long-continued, consistent administrative practice of the Veterans' Administration and its predecessor, the Veterans Bureau, and that, if allowed to stand, it would greatly increase the liability of the Government under Section 305 of the World War Veterans' Act (*supra*, pp. 2–3), probably by many millions of dollars. See letter of the Administrator of Veterans' Affairs to the then Solicitor General, dated January 14, 1941, copied at pages 22–25 of the *Florian* petition, and also a letter from the Administrator of Veterans' Affairs to the present Solicitor General, dated February 16, 1942, printed in the Appendix hereto (*infra*, pp. 12–14).

3. (a) In the *Florian* petition the Government recited at some length (pp. 9–13) the considerations which led it to conclude that the decision of the Circuit Court of Appeals could not be harmonized with the provisions and purposes of the insurance contract and of the statute under which it was issued, or with the purpose of Sec-

[3] While the Government in its petition expressed doubt as to the finality of the District Court judgment (Pet. 17), certiorari was sought on the grounds hereinafter stated.

tion 305 itself, as these contractual and statutory provisions have been judicially interpreted. It would seem unnecessary to repeat those considerations here.

(b) The *Florian* petition (pp. 13–15) also makes it clear, we think, that the Government may not be regarded as having acted belatedly or arbitrarily in making a finding of total permanent disability after the death of the insured in a case like the present one.[4]

(c) The court below apparently concludes in its present opinion that the Government's interpretation of Section 305 would have the effect of avoiding a revival of insurance for which provision had been made in earlier legislation, and refers to the legislative history as evincing a liberalizing intention only. The court has erroneously construed the earlier legislation. The 1921

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[4] It may be pointed out additionally that respondent's own allegations in the additional count (R. 26) justify the conclusion that the claim which resulted in the finding of total permanent disability was not filed until shortly prior to July 3, 1931—more than ten years after the insured's death—and that the finding was made within only a little more than five months later.

Ordinarily at least it is only by reason of a posthumous rating of total permanent disability that compensation accruing after total permanent disability may be said to have been due and uncollected at death. Certainly it is not arbitrary for the Government to insist that if a posthumous rating of total permanent disability is to be employed in claims against the Government, the Government has the right to assert that such disability did in fact exist.

amendment revived insurance only in those cases in which the veteran had *died* "without collecting or making claim" for the compensation due him when his insurance lapsed The 1923 amendment provided for revival also in those cases in which the insured had become *totally permanently disabled* "without collecting" the compensation due at lapse.[5] Of course, compensation due at lapse and uncollected at death would likewise be uncollected at the date of total permanent disability (if the insured became so disabled), so that the Government's interpretation could not possibly have the effect of avoiding the revival of insurance in any case in which the insurance would have been revived under earlier legislation.

The present question arises because the subsequent legislation embodied in Section 305 of the World War Veterans' Act eliminated the requirement that the compensation uncollected on the date as of which the insurance would have matured, if it had not lapsed, be the same compensation as that uncollected at lapse. (See 34 Op. A. G. 369.) The obvious reason for the elimination of this requirement was the recognition of the fact

[5] The 1921 amendment had been offered from the floor of the House and was inconsistent with the provisions of the contracts to which it related in that it ignored the fact that total permanent disability was as much insured against as death. The inconsistency was recognized at the time of the 1923 amendment by the member of the House who reported the amendment (64 Cong. Rec., Pt. 5, p. 5195).

that compensation due at death or total permanent disability might have been used to reinstate the lapsed insurance if it had been promptly paid.

(d) *United States* v. *McClure,* 305 U. S. 472, to which the court refers in its present opinion, related solely to the question whether Section 301, World War Veterans' Act, limiting the continuance of yearly renewable term insurance to July 2, 1927, prevented the revival of such insurance after July 2, 1927. This Court held that Section 301 had no such general application, pointing out that Section 304 contained an express provision limiting reinstatement of insurance to July 2, 1927, but that Section 305 contained no such express provision limiting revival. There is nothing in the *McClure* opinion to justify the statement of the court below that in the *McClure* case the "veteran could not have reinstated such lapsed insurance during his lifetime." Actually McClure could have reinstated at any time between August 9, 1921,[6] and July 2, 1927, but may have been prevented from doing so by the noncollection of compensation due him at all times during that period. The fact that he could not have reinstated after July 2, 1927, did not alter the fact, possibly regarded by this Court as controlling, that he may have been prevented from

[6] The date of the first legislative provision for the reinstatement of insurance by a disabled veteran (c. 57, 42 Stat. 147, 156–157).

continuing his insurance without lapse or reinstating it prior to that time by the noncollection of the compensation due him. In the instant case, on the contrary, the veteran collected all compensation which he might possibly have employed to continue or reinstate his insurance.

CONCLUSION

For the reasons indicated herein and elaborated in the Government's petition in the *Florian* case, it is respectfully submitted that this petition for a writ of certiorari should be granted.[7]

CHARLES FAHY,
Solicitor General.

MARCH 1942.

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[7] A petition for a writ of certiorari is being filed simultaneously in the companion case of *United States* v. *Anna Shepanek, Individually and as Administratrix of the Estate of William Babicz, also known as William LaValley*, No. 1039, involving the same questions and similarly decided by the court below on the authority of its decision in the instant case. A petition for a writ of certiorari is also being filed in *United States* v. *Pearlie Lawson, Administratrix of the Estate of Hobart Lawson, Deceased, and John A. Polin, Administrator of the Estate of Henry Lawson, Beneficiary, Deceased*, 124 F. (2d) 1020 (C. C. A. 6), to review a similar decision rendered *per curiam* upon the same authority by the Circuit Court of Appeals for the Sixth Circuit on January 15, 1942.